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AUTHOR Warden, Michael L.
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ABSTRACT

Two recent judicial and governmental developments appear to tip the scales in favor of the confidentiality of intelligence sources and methods at the expense of any "right of access" to government information. The implementation of the Reagan Administration's Executive Order governing the classification of national security information and the Supreme Court's decision in "CIA vs. Sims" are likely to have a significant impact on the amount of information that can be made available to the public under the Freedom of Information Act. The trend toward more secrecy represents the evolution of a nondisclosure philosophy within the Executive branch--a philosophy now sanctioned by the Supreme Court--that contravenes the prodisclosure intent of the Freedom of Information Act. This philosophy has been advanced through application by both the Executive and the Judiciary of a "mosaic" theory of confidentiality (in which individually insignificant pieces of information can be fitted together into a "mosaic" warranting confidentiality) as justification for withholding information. (One hundred and two footnotes are included.) (RS)

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Tilting the Balance Toward Secrecy: "Mosaic" Theory and Release of Information Under the Freedom of Information Act

By

Michael L. Warden

THE UNIVERSITY OF NORTH CAROLINA
Chapel Hill, NC

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Under the Freedom of Information Act

> **Mosaic:** A surface decoration made by inlaying small pieces of variously colored material (as tile, marble, or glass) to form patterns or pictures.[1]

Intelligence services of countries are in the business of collecting and interpreting information on foreign governments for national policymakers.[2] Like parts of a giant "puzzle," the bits and pieces of information gathered by intelligence services are the raw material on which the capabilities and intentions of foreign governments are assessed. These pieces form the "patterns" and "pictures" intelligence services present to political leaders and on which national security policy decisions depend.[3]

The mosaic-like nature of intelligence-gathering and the

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[1] **Webster's Third New International Dictionary** 1473 (1976).

[2] Lawrence Freedman, **U.S. Intelligence and the Soviet Strategic Threat (2d ed.)** (Princeton, NJ: Princeton University Press, 1986) at 9.

[3] See "The Collectors," an article by Cord Meyer in Roy Godson (editor) **Intelligence Requirements for the 1980's: Clandestine Collection** (Washington, D.C.: National Strategy Information Center) 199-222 (1982). Meyer is a former Assistant Deputy Director of Operations for the Central Intelligence Agency.

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traditional secrecy that surrounds national security information create special problems for democracies. As two constitutional law experts have observed, the fundamental problem is that:

> Secrecy is essential to the conduct of foreign relations and defense strategy; at the same time, however, it stifles domestic democratic processes and citizens' first amendment rights to debate controversial issues of national policy.[4]

No where is this conflict between secrecy and democracy more evident than in the continuing battle over how to reconcile the necessity for confidentiality of "intelligence sources and methods" with the right of access by citizens to government information.[5]

In this paper we will examine how the Courts have dealt with this conflict. Specifically, we will analyze two recent developments that appear to tip the scales in favor of confidentiality at the expense of any "right of access" to

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[4] Harold Edgar and Benno C. Schmidt, Jr. "Curtiss-Wright Comes Home: Executive Power and National Security Secrecy," 21 Harvard Civil Rights-Civil Liberties Law Review 349, 352-353 (1986)

[5] The National Security Act of 1947, which established the Central Intelligence Agency, provides that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Section 102(d)(3) of the National Security Act of 1947, 50 USC § 403(d)(3). The Freedom of Information Act, 5 U.S.C. § 552 (1988) provides a general "right of access" to government information.

government information. These developments are:

(1) The implementation of the Reagan Administration's Executive Order governing the classification of national security information,[6] and

(2) The Supreme Court's decision in **CIA v. Sims**[7]

Both of these events are likely to have a significant impact on the amount of information that can be made available to the public under the provisions of Freedom of Information Act.[8] However, they also represent the advancement of a disclosure philosophy of equal or, in some respects, greater significance. The Reagan order and the **Sims** decision represent the evolution of a nondisclosure philosophy within the Executive Branch — a philosophy now sanctioned by the Supreme Court — that contravenes the prodisclosure intent of the Freedom of Information Act (FOIA). This philosophy has been advanced through application by both the Executive and the Judiciary of a "mosaic" theory of confidentiality as justification for withholding information.

What, then, is "mosaic" theory, and how has it affected disclosure of government information under FOIA?

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[6] Executive Order 12,356, "National Security Information," 47 Fed. Reg. 14874, 3 C.F.R. 166 (1982).

[7] **CIA v. Sims**, 105 S.Ct. 1881 (1985).

[8] 5 U.S.C. § 552.

Mosaic Theory of Disclosure

The origin of this "mosaic" theory is not certain. However, the fact that it is being applied to disclosure decisions is a certainty. In his authoritative work on the Freedom of Information Act, James T. O'Reilly notes that in determining what material will or will not be released under FOIA:

> [C]ourts are reluctant to segregate and release when an agency asserts that all of the documents fit into a mosaic of confidentiality, so that each released document aids the adversaries.[9]

"Mosaic" theory — the concept that individually insignificant pieces of information can, somehow, be fitted together into a "mosaic" warranting confidentiality — appears to have been borrowed from the information collection and analysis practices of U.S. intelligence services. In America the "intelligence community"[10] is responsible for obtaining, processing, evaluating, protecting and exploiting "information

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[9] James T. O'Reilly, 1 **Federal Information Disclosure** Chapt. 11 "Exemption for National Security Information" at 42 (1986)(emphasis added).

[10] The "intelligence community" is composed of the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, the intelligence branches of the Army, Air Force, and Navy as well as the State Department, Energy Research and Development Administration (ERDA), Federal Bureau of Investigation, and the Treasury Department. See Freedman, supra note 2, at 8.

needed or desired by the Government in pursuance of its national interests."[11] Through the collection and accumulation of "numerous bits of information" from both overt and clandestine sources,[12] intelligence services discern "patterns" that form the basis of their analyses.[13] This method of analysis — analogous

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[11] Godson, supra note 3, at 5. The current charter, organization and purpose of the U.S. intelligence community is set forth in Executive Order 12333, "United States Intelligence Activities," signed December 4, 1981, 48 Fed. Reg. 59947 (1981).

[12] "Sources" of intelligence generally fall into two categories: "technical" and "human." Technical sources are usually a myriad of collection devices including, but not limited to, collection and analysis of telecommunications and "imagery" sources such as satellite, airborne, and ground photography. Human sources include the classic "spies" popularized in novels and films but more typically include "agents," "informants" (both knowing and unknowing) and other sources of informed insight including military attaches and the diplomatic corps. Roy Godson (ed.) **Intelligence Requirements for the 1980's: Elements of Intelligence (Rev. Ed.)** (New Brunswick: Transaction Books, 1983) and Allen Dulles, **The Craft of Intelligence** (New York: Harper & Row, 1963) inter alia.

However, sources are not always clandestine. According to testimony from General Hoyt Vandenberg, director of the Central Intelligence Group, predecessor of the CIA,

> "[R]oughly 80 percent of intelligence should normally be based [on]...the great open sources of information...such things as books, magazines, technical and scientific surveys, photographs, commercial analyses, newspapers, and radio broadcasts, and general information from people with a knowledge of affairs abroad." **National Defense Establishment: Hearings on S. 758 Before the Senate Committee on Armed Services**, 80th Cong., 1st Sess., Pt. 3, 492 (1947).

[13] For analysts' reliance on finding "patterns" in data, (continued...)

to the collection of bits and pieces of colored material fitted together to form decorative mosaic patterns — lends itself to the characterization of intelligence gathering as a very "mosaic-like" process.[14]

The Government has argued and lower courts have apparently accepted this "mosaic" analogy in adjudicating nondisclosure decisions by intelligence agencies to Freedom of Information Act requests.[15] Incorporation of this "mosaic" theory into the current Executive Order governing classification of information and in the Supreme Court's ruling in **Sims**, however, represents the potential for much broader application of "mosaic" theory to government disclosure decisions. Broader application would be a significant development in the battle being waged under FOIA over government secrecy versus disclosure.

However, to more fully assess the potential impact this theory might have on disclosure we must first understand the background of FOIA.

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[13](...continued)
see Stephen J. Cimbala (ed.), **Intelligence and Intelligence Policy in a Democratic Society** (Transactional, 1987) 2.

[14] For example, the Court of Appeals for the District of Columbia has written of "the mosaic-like nature of intelligence gathering." **Salisbury v. United States**, 690 F.2d 966, 971 (D.C. Cir. 1982).

[15] Id.. See also O'Reilly, supra note 9.

Background

When Congress passed the Freedom of Information Act in 1966 it intended to extend to the public a broad legislated right of access to government information.[16] This new "right of access," however, was not absolute.[17] FOIA was never intended by the Congress to mandate uninhibited disclosure nor unincumbered access to all information gathered, produced or stored by the government. There were limits built in to the Act:

- FOIA applied to the federal, not state or local agencies[18]
- Significant portions of the federal government were not subject to the disclosure requirements of FOIA including Congress, the President and the courts.[19]

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[16] For a comprehensive compilation of significant documents concerning FOIA, see Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, **Freedom of Information Source Book: Legislative Materials, Cases, Articles**, S. Doc. 9382, 93d Cong., 2d Sess. (Comm. Print, 1974).

[17] "[A]lthough the Supreme Court has found a First Amendment right of access to government information in the narrow context of requiring open criminal trials . . . . [it] has never held that the First Amendment guarantees citizens a general right of access to government information." Statement of Professor Mary Cheh, Executive Order Hearings, infra note 27 at 29.

[18] 5 U.S.C. §552(e), citing "agency" as defined in §551(1). See, generally, Alder, infra note 31, Chapter 13.

[19] The courts and Congress are expressly excluded from coverage under FOIA, 5 U.S.C. § 551(1)(A) and (B). Similarly, FOIA does not extend to the President or his immediate personal staff "whose sole function is to advise and assist the

(continued...)

- Only Federal agencies — primarily the executive departments, military services, and independent regulatory agencies — were covered by FOIA.[20]

- Not all information retained by those executive branch agencies covered by the Act was subject to release.[21]

When Congress enacted FOIA it provided for nine exemptions that federal agencies could invoke to deny release of certain categories of information.[22] Perhaps one of the broadest and most controversial of these exemptions is the exception for matters concerning "national security" — the first of the nine categories of information exempted from mandatory disclosure.[23] Exemption 1 of the Freedom of Information Act provided that the disclosure requirements did not apply to matters that were:

> (1) specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy, and
>
> (2) are in fact properly classified pursuant to such

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[19](...continued)
President." House Report No. 1380, 93d Congress, 2d Sess., at 15 (1974).

[20] Supra note 18.

[21] 5 U.S.C. §552(b).

[22] Id.

[23] Id., at (b)(1). See generally Burt A. Braverman and Frances J. Chetwynd, **Information Law: Freedom of Information, Privacy, Open Meetings, Other Access Laws (Vols. I and II)** (New York: Practising Law Institute, 1988), especially Chapter 5 on Exemption 1 (National Security Information).

Executive order[24]

Despite these numerous exclusions, qualifications and exemptions it was Congress' intent that "disclosure, not secrecy" was to be the dominant objective of the Freedom of Information Act.[25] Congress recognized the inherent conflict between government secrecy and the prodisclosure objectives of FOIA. Addressing this controversy the Senate, in reporting its version of the legislation, noted:

> It is not an easy task to balance the opposing interests [of full government disclosure v. agency secrecy], but it is not an impossible one either . . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure.[26]

Congress recognized that it, alone, could not mandate a "workable formula" that would resolve the contest. The Executive branch not only produced the information that would be released under the Act, but would also have to write the rules and regulations implementing Congress' intent under FOIA. One of the

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[24] 5 U.S.C. § 552(b)(1) (emphasis added).

[25] **Department of the Air Force v. Rose**, 425 U.S. 352, 361 (1976) (emphasis added).

[26] See Senate Rep. No. 813 at 3, contained in **Freedom of Information Source Book**, supra note 16.

most significant of the rules and regulations that would affect the implementation of FOIA was the presidential order that governed the "classification" of government secrets.

Executive Order

Governments have always had "secrets." Since the founding of the Republic the government has kept secret some kinds of information from adversaries, from citizens and even from itself.[27] Even the Constitution provides for secrecy in Congress.[28] However, it was not until World War II that a government-wide secrecy system was formalized regulating the

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[27] For example, on November 29, 1775 the Continental Congress created the Committee of Secret Correspondence. In carrying out its duties of obtaining intelligence, the committee placed great importance upon secrecy, stating:

> "Considering the nature and importance of it, we agree in opinion that it is our indispensable duty to keep it a secret even from Congress. We find by fatal experience that Congress consists of too many members to keep secrets."

Congressman Thomas N. Kindness quoting a Committee of Secret Correspondence document in 1982 hearings before a Subcommittee on Government Operations, **Executive Order on Security Classification**, 97th Cong., 2d Sess., 2 (1982).

[28] The Constitution provides for publication of a journal of each House of Congress except "such parts as may in their judgment require secrecy." Art. I, 5. For a discussion of secrecy see generally Louis Henkin, "The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers," 120 **U. Pa. L. Rev.** 273 (1972).

"classification" of information.

In 1940 President Roosevelt issued the first Executive Order prescribing a classification policy and establishing procedures to protect the security of armed forces installations and equipment as well as "information relative thereto."[29] Since that first directive every President has issued an Executive Order governing the identification, classification, declassification, and safeguarding of national security information by the Executive branch.[30] The content, procedures

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[29] The order relied on a 1938 statute for authority, 52 Stat. 3 (1938). Executive Order 8381 authorized use of classification and distribution control markings on "all official military or naval books, pamphlets, documents, reports, maps, charts, plans, designs, models, drawings, photographs, contracts, or specifications which are now marked under the authority of the Secretary of War or the Secretary of the Navy as 'secret,' 'confidential,' or 'restricted,' and all such articles or equipment which may hereafter be so marked with the approval or at the direction of the President." 5 Fed. Reg. 1145 (Mar. 26, 1940). The order extended to government-wide use a system of classification that had existed within the armed forces and was primarily limited to matters of military and national defense.

[30] Truman issued two Executive Orders governing the classification of government information. He was also the first to expand the classification system beyond traditional military and national defense-related information to include foreign policy information as well under the umbrella of "national security" information. President Eisenhower adopted his own Executive Order and the Kennedy and Johnson Administrations essentially relied on amendments to the Eisenhower order. Since then, Presidents Nixon, Carter and Reagan issued their own versions of the classification order. President Ford did not change the Executive Order already in effect under Nixon. The current Executive Order is E.O. 12,356, "National Security Information," signed by President Ronald Reagan in April 1982,

(continued...)

and philosophy contained in the Executive Order are important because government information identified and classified pursuant to the order is exempted from compulsory disclosure by Exemption 1 of FOIA.[31]

Although the Congress has amended FOIA to emphasize the judiciary's oversight role,[32] the courts have maintained a largely deferential posture in overseeing classification practices of the Executive branch.[33] For this reason, the

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[30](...continued)
and it remains in effect today. As of this writing no new Executive Order has been issued by President Bush. For a history of the differences between these executive orders through the Reagan directive, see **Security Classification Policy and Executive Order 12356**, H. Rept. 97-731, 97th Cong., 2d Sess. (1982).

[31] Exemption 1 provides that FOIA does not apply to the release of information relating to national security that has been classified in accordance with Executive Order. 5 U.S.C. §552(b)(1). "The Executive Order sets out both substantive and procedural criteria for withholding national security information." Allan Adler, **Litigation Under the Federal Freedom of Information Act and Privacy Act (13th ed.)** (Washington, D.C.: American Civil Liberties Union Foundation, 1988) 23.

[32] Congress enacted amendments to FOIA in 1974 that "specifically authorized in camera review and release of segregable portions even of classified documents. It also instructed courts to determine de novo whether information was **properly** classified...." Id. at 21. The Freedom of Information Act and Amendments of 1974 (P.L. 93-502).

[33] Morton Halperin, testifying for the American Civil Liberties Union against proposed changes to FOIA, stated:

> "A review of the actual court decisions will show clearly that the courts have been extremely deferential to the judgments made by the agencies regarding

(continued...)

policies and procedures governing classification of national security information spelled out in an Administration's Executive Order determine the amount of information that can be made available to the public on national security. This autonomy granted to the Executive Branch by the Congress[34] has some predictable results because, as some constitutional law experts have commented:

> The Executive is inherently self-interested in expanding the scope of matters deemed "secret"; the more that is secret the more that falls under executive control. There is surely room in our separation of powers dialectic . . . to doubt the wisdom of allowing the fox to define the parameters of — not to mention guard — the chicken coop.[35]

Despite the Executive's relative autonomy in these matters

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[33](...continued)
classification of information. In fact, they have generally given a broad reading to the act's requirement that judges give substantial weight to explanations given by the agencies for withholding certain documents."

Freedom of Information Act, 97th Cong., 1st Sess., Vol. 1, Serial No. J-97-50, 603 (Committee Print, 1982). For a contrasting viewpoint see testimony of Ms. Ann Caracristi, Deputy Director, National Security Agency Id. at 612-626.

[34] It is the Executive Branch's position that this autonomy is not, in fact, granted by the Congress but is, instead, part of the constitutional responsibilities of the President as Commander-in-Chief. See remarks of Deputy Attorney General, supra note 27 at 131 for articulation of this position.

[35] Edgar & Schmidt, supra note 4, at 354.

each administration has actually narrowed, not expanded the parameters of the national security chicken coop. Every administration since Eisenhower has attempted to increase the public's access to national security information — often under pressure from Congress, the press and the public.[36] Access was increased by either reducing the numbers of officials authorized to classify information, narrowing the scope of government information subject to classification, or increasing the justification required for classification.[37]

The Carter Executive Order advanced the trend of more access by becoming the first classification directive to require a "balancing of the public interest" against the need for withholding information for national security reasons. Where the public interest in disclosure outweighed the need to protect information, the Carter order directed that the information be declassified and released.[38] However, this 30-year trend of increased access and efforts to balance the public's right to know against the need to protect national security information suffered a setback under the Reagan Administration.

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[36] Supra, notes 27 and 30, inter alia.

[37] Supra note 30.

[38] Id., at 12. Executive Order 12065 §3-303.

Reagan Executive Order

In April 1982 President Reagan signed Executive Order 12356, establishing government-wide policy for safeguarding and classifying "National Security Information."[39] This order corrected what the Reagan administration perceived had been an imbalance over the years unduly favoring public access at the expense of national security. In hearings before a House subcommittee Deputy Assistant Attorney General Richard Willard acknowledged that the new Reagan order was different from its predecessors.

> [T]his Executive order does send a message that to some extent changes the focus of the Jimmy Carter Executive order. We believe that this is the prerogative that President Reagan has. To some extent the last administration failed sufficiently to emphasize the importance of keeping national security information classified and safeguarding it. . . . We do think that the Carter order did go too far.[40]

Congressman Glenn English, chairman of the subcommittee, reminded the deputy attorney general that the Reagan order had also reversed the trend toward more access to national security information. But Willard responded, "The fact that a trend has been going on for 30 years doesn't mean that it should continue

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[39] Supra note 6.

[40] Executive Order Hearings, supra note 27, at 211.

blindly for 30 more years."[41]

While the Reagan order differed from previous Executive orders governing classification in several other ways,[42] we will examine only one of those changes — the incorporation of a so-called "mosaic theory" for the first time as a basis for classifying government information.[43]

Like its predecessors Executive Order 12356 enumerated several categories of information that could be considered for classification. For example, information concerning military plans or weapons, intelligence activities, intelligence sources or methods and programs to safeguard nuclear facilities were some of the categories of information that could be classified.[44] Information, once classified, was assigned a **level** of

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[41] Id.

[42] Id. These hearings were an exhaustive treatment of the changes brought about by the Reagan Executive Order. The hearings focused on most of the changes made by the Reagan directive compared to the Carter order. See especially Appendix 2, 279-316 for a detailed comparison of the two orders. The differences are also explained in Kent R. Middleton and Bill F. Chamberlin, **The Law of Public Communication** (New York: Longman, 1988) 490-1.

[43] Interestingly the hearings held by Congressman English's subcommittee, supra note 27, did not formally address the incorporation of a "mosaic" theory into the classification directive. The American Civil Liberties Union did not address it in their prepared remarks, nor did the Committee address it during questioning of witnesses. However, see infra note 49.

[44] Executive Order 12356, §1.3(a).

classification ("top secret," "secret," or "confidential") according to the degree of harm to national security that could be "reasonably" expected in the event of its unauthorized disclosure.[45] In this respect the Reagan order differed from its predecessors only in its more specific enumeration of categories of information eligible for classification.

However, the Reagan order added another category of classifiable information that did differ from previous orders. The Reagan classification order permitted government officials to classify any information whenever its disclosure "either by itself or in the context of other information, reasonably could be expected to cause damage to the national security."[46] This provision of the Executive Order has been criticized by some FOIA supporters in Congress.

> These classification standards [of E.O. 12356] are widened further by the addition of new authority in section 1.3(b) to classify information that would not damage national security if disclosed "by itself," but that reasonably could be expected to cause damage if disclosed "in the context of other information." This concept is known as the

[45] E.O. 12356, §1.1(a). However, regardless of **level**, any information classified pursuant to this Executive Order is exempted from disclosure under the Freedom of Information Act.

[46] Id., §1.3(b).

"mosaic" theory of classification.[47]

This "mosaic" theory, according to critics, would allow government officials to classify information even if that information might be "harmless in isolation," but when combined with other information "might damage national security."[48] In the abstract, this concept is difficult to grasp.[49] Clearly the potential impact on government disclosures under FOIA of this section of the Executive Order was subject to dispute. Others, however, saw an indisputable impact of the section on national security reporting. For example, David Martin, a correspondent

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[47] Remarks of Senator Huddleston, 128 Cong. Rec. Pt. 6 at 8063 (April 28, 1982).

[48] Id.

[49] Dr. Anna K. Nelson, Department of History, George Washington University testified before Congressman English's subcommittee on behalf of the American Historical Association. Concerned about the ambiguity of Section 1.3(b), she asked:

> "What does 'context of other information' mean? What will it mean to the declassifier? The very purpose of historical research is to gather together information from a variety of sources which will have meaning in the context of other information. Perhaps those who wrote that line did so over concern that an intelligence source might emerge from this mosaic of information. But if that is so, this section is a clear case of overkill."

Executive Order Hearings, supra, note 27, at 109-110.

for CBS television,[50] who has been critical of the Reagan Executive Order, cited the experiences of author James Bamford,[51] as evidence of the impact of "mosaic" theory.

> [I]f, for instance, Bamford can put the unclassified history of a Navy radio station together with the names in the National Security Agency's newsletter and deduce that he has found an NSA listening post, then all that material (including the unclassified radio station history) can be reclassified.[52]

Martin's example was, of course, hypothetical. Author James Bamford had already published his book on the National Security Agency before the Reagan Executive Order took effect and the

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[50] Before joining CBS to cover national security issues he was Pentagon correspondent for **Newsweek** magazine. Before going to the Pentagon, he covered the Central Intelligence Agency out of **Newsweek**'s Washington bureau and has authored two books on intelligence. David C. Martin, **Best Laid Plans** (New York, Harper & Row, 1984) about America's "secret" war to combat terrorism including the use of "special activities" (covert operations) by the CIA against terrorists. He also authored **Wilderness of Mirrors** (New York: Harper & row, 1980).

[51] Bamford authored the controversial book on the National Security Agency, **The Puzzle Palace** (Houghton Mifflin, 1982).

[52] Martin is quoted in Steve Weinberg, "Creeping Secrecy," **Columbia Journalism Review** 31, 32 (November/December 1983) (emphasis added). His comment refers to the Reagan order's provision allowing government officials to reclassify information that has been previously declassified or disclosed. E.O. 12356, §1.6(c). The comment is pertinent to original classification decisions by officials as well. Had author Bamford sought release of an unclassified history of the Navy radio station together with the National Security Agency's unclassified newsletter, both the newsletter and the radio station history could be classified under the provisions of §1.3(b). They were not at the time because Bamford's research was conducted before implementation of the Reagan order.

"mosaic" theory could not be applied to information already released to him under the Freedom of Information Act.[53] However, the Supreme Court did not have to rely on the Reagan order to make its own contribution to this nondisclosure theory. When the Court considered the government's appeal of a FOIA case seeking Central Intelligence Agency documents relating to agency drug testing, "mosaic" theory received strong, uncritical support from the Judiciary.

CIA v. Sims

Between 1952 and 1966 the CIA financed a program of experimental, laboratory and library research devoted primarily to behavior modification techniques and mind-altering drugs. These experiments — first revealed by the Church Committee hearings in 1975[54] — included the administration of LSD to

[53] In fact Bamford made extensive use of the Freedom of Information Act in obtaining source documents for his investigative book on the NSA. The Reagan Administration did attempt to retrieve some of the materials released to Bamford. He refused to return them and the Administration declined to seek them through litigation. See Executive Order Hearings, supra note 27, at 183.

[54] Congress conducted a series of joint hearings of the Senate Select Committee on Intelligence and Subcommittee on Health and Scientific Research of the Committee on Human Resources, under the chairmanship of Senator Frank Church. The results of their investigation into this aspect of CIA activities is reported in **Project MKUltra: The CIA's Program of Research in Behavioral Modification**, 97th Cong., 1st Sess. (1977).

unwitting subjects resulting in at least one documented death.[55] The experiments and related scientific projects were collectively known as "MKUltra." According to court documents, research conducted by the CIA under MKUltra was:

> [E]ssentially academic in nature, ranging from drug experiments on individuals to laboratory research on deterioration of petroleum products, from the synthesis of mind-altering drugs to the preparation by a magician of a manual on sleight-of-hand techniques.[56]

Many of the scientists who worked on MKUltra experiments and research projects were funded through a CIA front organization, the Society for Investigation of Human Ecology. Because of this indirect method of funding many of the project's researchers, universities and other institutions involved in MKUltra were unaware of the CIA's involvement.[57]

Revelation of the MKUltra program during the Church

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[55] For an account of the death, see John Ranelagh's expansive and unflattering account of the history of the CIA in **The Agency: The Rise and Decline of the CIA (Revised and Updated ed.)** (New York: Touchstone, 1987), 208-210. Ranelagh had "thousands of documents" released to him under the Freedom of Information Act in researching his book. Id. at 11. See also John Marks, **The Search for the Manchurian Candidate: The Story of the CIA's Secret Efforts to Control Human Behavior** (London: Allen Lane, 1979).

[56] **Sims v. CIA**, Civ. No. 83-1249, Petition for Writ of Certiorari, filed Jan. 27, 1984, from U.S. Court of Appeals for the District of Columbia, Petitioner's Brief at 3.

[57] Id.

Committee hearings aroused considerable controversy in the public and in Congress about CIA use of university research facilities and abuse of human experimental subjects. Despite the widespread publicity surrounding the Church Committee revelations about MKUltra experiments many of the details of the projects remained unknown because in 1973 the CIA had destroyed all known files pertaining to MKUltra.

According to the Church Committee's final report of its investigation of the projects:

> The destruction of the MKUltra documents made it impossible for the Select Committee to determine the full range and extent of the largest CIA research program involving chemical and biological agents [and] prevented the CIA from locating and providing medical assistance to the individuals who were subjects in the program.[58]

Attempts to find out more about MKUltra experiments might have ended after the Church Committee's final report and public interest had waned. However, in 1977 CIA Director Stansfield Turner notified the Senate Intelligence Committee that the Agency had found additional records on MKUltra that had escaped destruction. MKUltra was on the front pages again.[59] The

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[58] **Final Report: Foreign and Military Intelligence**, S. Rep. No. 755, 94th Cong., 2d Sess. 404 (1976).

[59] Admiral Turner, in his memoirs, relates the following account of the discovery of MKUltra records:

(continued...)

surviving documents — all unclassified — consisted primarily of research contracts, vouchers, bills, a few progress reports justifying requests for more money and similar materials concerning the financing of MKUltra projects.[60] These documents became the subject of a FOIA request filed in August 1977 by

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[59](...continued)

> "[I]n the summer of 1977, well after the Church Committee had disbanded, I was told that we had found in a remote archive some of the documents the committee had requested. Of course it looked as if the CIA had deliberately held back the documents when the committee most needed them. In fact . . . . [w]hile researching a request under the Freedom of Information Act on this subject [CIA employee Laubinger] searched financial records, rather than simply going through operational files, as had been done previously. Sure enough, he found many data about the funding for the drug program."

Stansfield Turner, Secrecy and Democracy: The CIA in Transition (Boston: Houghton Mifflin, 1985) 42.

[60] Petition for writ of certiorari, supra note 56, at 3. According to the petition to the Supreme Court by Wolfe and Sims, these documents only permitted "educated guesses" about what some of the individual research projects involved. However, according to their petition:

> "[T]he [surviving] documents are singularly uninformative about the matters of greatest public interest -- what did the researchers do, what were their findings, what were the side effects of the work and who was victimized . . . . Because the leading CIA figures in the program have either refused to discuss the details or claimed poor memory, the only remaining avenue to investigate MKULTRA is to identify the researchers, talk to them, and then to undertake further independent analysis to determine what they did." Id., at 3-5.

public health interest activist Dr. Sidney Wolfe and John Cary Sims, an attorney.

After lengthy negotiation the CIA agreed to allow Wolfe and Sims access to most of the surviving documents and released a list of the projects funded under MKUltra and the names of the institutions at which research was conducted. Approximately one-third of the names of the institutions and all references to individual researchers were deleted from documents released by the CIA.[61] The CIA refused to release the names of individual researchers and the remaining one-third of the institutions, citing Exemption 3 to FOIA.[62] The deletions were necessary because, the Agency claimed:

(1) the institutions and researchers involved in MKUltra research were "intelligence sources"

(2) that the National Security Act of 1947 empowered the Director of the CIA to withhold the names of "intelligence sources and methods," and

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[61] MKUltra involved "at least 80 institutions and 185 private researchers" and provided funding for 149 known subprojects. Id. at 2-3, 32a.

[62] Exemption 3 provides that FOIA does not apply to matters that are "specifically exempted from disclosure by statute provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld." 5 U.S.C. §552(b)(3). The CIA cited the National Security Act of 1947 provision that "the Director of Central Intelligence shall be responsible for protecting intelligence sources and methods from unauthorized disclosure." Supra note 5.

(3) the National Security Act qualified as an Exemption 3 statute.[63]

While both the District Court[64] and Court of Appeals[65] concurred with the CIA that the National Security Act qualified as a withholding statute, they disagreed with the agency's characterization of the institutions and researchers involved in MKUltra as "intelligence sources and methods." They ordered the CIA to reveal the names of all institutions and almost all of the researchers based on the Court of Appeals' own construction of a definition of what qualified as "intelligence sources and methods."[66] The Supreme Court, in a unanimous opinion,

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[63] See Respondent's Brief, supra note 56. The National Security Act of 1947, supra note 5.

[64] An early opinion of the District Court, **Sims v. CIA**, is reported at 479 F. Supp. 84 (D.D.C. 1979). The final opinions and order of the district court from which final appeal was made are not reported, but the memorandum opinion issued by Judge Oberdorfer, December 22, 1981, in Civil Action No. 78-2251, **Sims v CIA**, is contained as an attachment to the government's Petition for Writ of Certiorari, **CIA v. Sims**, No. 83-1075, Appendix B, at 22A.

[65] **Sims v. CIA** 709 F.2d 95 (D.C.Cir. 1983). An earlier opinion (Sims I) is reported at 642 F.2d 562 (D.C.Cir. 1980).

[66] Court of Appeals, concluding that the phrase "intelligence sources and methods" was "ambiguous" formulated its own definition of "intelligence source":

> "[A]n 'intelligence source' is a person or institution that provides, has provided, or has been engaged to provide the CIA with information of a kind the Agency

(continued...)

overturned the Court of Appeals, ruling that Congress had given the CIA, not the Courts, "broad power to control the disclosure of intelligence sources."[67] In his opinion for the Court, Chief Justice Burger wrote that based upon the "plain meaning" of the statute and the legislative history of the National Security Act:

> [W]e hold that the Director of Central Intelligence was well within his statutory authority to withhold the names of the MKUltra researchers from disclosure under FOIA . . . . MKUltra researchers are 'intelligence sources'. . . because these persons provided, or were engaged to provide, information the Agency needs to fulfill its statutory obligations with respect to foreign intelligence.[68]

The ruling in Sims went beyond simply empowering the CIA to withhold the names of intelligence sources. The Court contended

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[66](...continued)
needs to perform its intelligence function effectively, yet could not reasonably expect to obtain without guaranteeing the confidentiality of those who provide it."

Quoting Court of Appeals decision in Sims I, CIA Petition for Writ for Certiorari, supra note 64 at 4.

[67] Sims, at 1890. Chief Justice Burger called the Court of Appeals' formulation of its own definition of "intelligence source" a "crabbed reading of the statute" that "contravenes the express language of § 102(d)(3), the statute's legislative history, and the harsh realities of the present day." According to Burger, "The dangerous consequences of that narrowing of the statute suggest why Congress chose to vest the Director of Central Intelligence with the broad discretion to safeguard the Agency's sources and methods of operation." Id. at 1891.

[68] Id.

that in order to carry out the mandate of Congress to protect "intelligence sources and methods" the Director of Central Intelligence was also empowered to withhold other kinds of information in CIA files that might be sought through FOIA. Therefore, the Court ruled, the agency could withhold any information that would permit an adversary to determine what is being studied and researched by the CIA or would assist foreign intelligence services in deducing the identities of U.S. intelligence sources or methods.[69] This broad power to withhold information was necessary because, the Court reasoned:

> [T]he very nature of the intelligence apparatus of any country is to try to find out the concerns of others; bits and pieces of data "may aid in piecing together bits of other information even when the individual piece is not of obvious importance itself."[70]

In the Court's view only the Director of Central Intelligence, not judges, can properly determine what information will betray "intelligence sources and methods" and what will not. Because "[w]hat may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene and may put the questioned item of information in its proper context,"[71] the

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[69] Id. at 1892.

[70] Id., quoting **Halperin v. CIA**, 629 F.2d at 150 (1980).

[71] **Halperin v. Helms** 598 F.2d 1, 9 (1978), quoting **United** (continued...)

Director of Central Intelligence:

> [H]as the power to withhold superficially innocuous information on the ground that it might enable an observer to discover the identity of an intelligence source. . . .The decisions of the Director, who must of course be familiar with "the whole picture," as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake. It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency.[72]

The Court's decision granted broad discretion to the Director of Central Intelligence in withholding potentially vast amounts of information that might be sought by the press and public through the Freedom of Information Act.[73] Although Congress had empowered judges to review agency FOIA decisions "de novo," courts have traditionally deferred to agency

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[71](...continued)
States v. Marchetti, 466 F.2d 1309, 1318 (CA4), cert. denied, 409 U.S. 1063 (1972). **Sims**, at 1892-3.

[72] **Sims**, at 1893 (footnotes omitted).

[73] Justice Thurgood Marshall, in a concurring opinion that sounds more like a dissent, contends that the class of information that the Court defines as exempt from disclosure under FOIA with **Sims** "is boundless." He writes:

> "It is difficult to conceive of anything the Central Intelligence Agency might have within its many files that might not disclose or enable an observer to discover something about where the Agency gathers information." **Sims**, Marshall concurring, 1899.

nondisclosure decisions involving questions of national security and government invocation of Exemption 1.[74] Now, with **Sims**, this deference is extended — even expanded — to Exemption 3 cases. The Supreme Court explicitly directed the judiciary to — in matters concerning intelligence — defer to the CIA because only the Director of Central Intelligence possessed the "whole picture" necessary to make withholding decisions.[75]

Some commentators have argued that the decision in **Sims** actually has been far more expansive of the Executive's

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[74] Antonin Scalia, in testimony before a Senate subcommittee hearings on proposed changes to the FOIA, provided an insight into the reluctance of federal judges to overrule government nondisclosure decisions for national security. Scalia, a professor of law at the time but later appointed to the Supreme Court, said of FOIA:

> "In the national security field, perhaps the most unreasonable provision [of FOIA] is the requirement for de novo judicial review of the fact that information is properly classified. This is absurd enough when one merely considers in the abstract that a judge is being asked to determine, on his own and with the burden of proof on the Government, what is necessary for national security, what will impair our relations with foreign governments . . . . These are questions which the courts will avoid on the basis of the political question doctrine even when they are presented in connection with the most significant civil and criminal litigation. Imagine pushing the courts into this for the purpose of ruling on an FOIA request."

Freedom of Information Hearings, supra note 33, at 960.

[75] Supra note 72.

discretion in withholding decisions because Exemption 3 "casts a much wider net than the more technical Exemption 1."[76] One reason for this is that, unlike Exemption 1, Exemption 3 decisions do not entail de novo review of documents to determine propriety of withholding.[77] Exemption 3 de novo review is limited to the simple determination whether the information withheld logically falls under the withholding statute claimed by the agency.[78]

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[76] **United States Student Association v. Central Intelligence Agency**, 620 F. Supp. 565, 570 (D.C.D.C. 1985). For this as well as other criticisms of the Court's decision in **Sims** see also: Jeffrey R. Godley, "Administrative Law - Defining the CIA's 'Intelligence Sources' As An Exemption to the Freedom of Information Act -- CIA v. Sims, 471 U.S. 159 (1985)," 9 **Western New England Law Review** 333-360 (Spring 1987); Michael H. Hughes, "CIA v. Sims: Supreme Court Deference to Agency Interpretation of FOIA Exemption 3," 35 **Catholic University Law Review** 279-306 (Fall 1985); Mark Jordan, "Case Comment -- Freedom of Information Act: CIA's Right to Nondisclosure Broadened by Liberal Definition of Intelligence Source," 25 **Washburn Law Journal** (3) 586-597, (1986); and Goldston, infra note 100.

[77] "Exemption 3 differs from other FOIA exemptions in that its applicability depends less on the detailed factual contents of specific documents; the sole issue for decision is the existence of a relevant statute and the inclusion of withheld material within the statutes coverage." **Goland v. CIA** 607 F.2d 339, 350 (D.C. Cir. 1978) rehearing denied, 607 F.2d 367 (1979), cert. denied, 445 U.S. 927 (1980); **Association of Retired Railroad Workers, Inc. v. United States Railroad Retirement Board**, 830 F.2d 331, 333 (D.C. Cir. 1987).

[78] For example, as the Court noted in **Sims**, their Exemption 3 analysis was complete when the Court determined that names of CIA researchers constituted statutorily protected "intelligence sources and methods." No further review of the documents or the propriety of the Agency's decision was required. **Sims**, 1887.

With the Supreme Court's decision in **Sims** the Central Intelligence Agency has advanced the "mosaic" theory as justification for nondisclosure of documents even if those documents contain apparently innocuous "bits and pieces of data." Innocuous information may, under the Court's broad definition of what constitutes "intelligence sources and methods," be properly withheld by the Agency.[79] The impact of this decision on the delicate balance between secrecy and openness has not gone unnoticed. According to Justice Marshall:

> The result is to cast an irrebuttable presumption of secrecy over an expansive array of information in Agency files, whether or not disclosure would be detrimental to national security, and to rid the Agency of the burden of making individualized showings of compliance with an executive order [that would be required in Exemption 1 claims].[80]

To test Justice Marshall's and others' predictions of the dire consequences this decision will have on government disclosures under FOIA we must turn to an examination of how the lower courts have interpreted **Sims**.[81]

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[79] "[E]ven newspapers and public libraries, road maps and telephone books appear to fall within the definition adopted by the Court." Id. at 1899, Marshall concurring.

[80] Id.

[81] Godley has observed that "by permitting the CIA to withhold from the public virtually any information it obtains, the Court's overbroad definition [of 'intelligence sources and (continued...)

Sims As Precedent

A review of other decisions reveals that the lower courts have, thus far at least, treated the Supreme Court's decision in Sims as primarily a distinguishing case in further defining what laws qualify as Exemption 3 statutes.[82] Sims has been cited as reason to grant broad discretionary powers to the government in withholding tax records.[83] However, the broad, unreviewable

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[81](...continued)
methods" in **Sims**] disregards the important public interest in acquiring information necessary to review the propriety or legality of CIA operations." Godley, supra note 76 at 353.

Hughes has commented that "[t]he result of the Court's decision in **Sims** is to deny the judiciary any meaningful role in determining whether the CIA, in a particular case, has correctly invoked FOIA exemption 3 and properly withheld material to protect the identity of or information provided by 'intelligence sources.'" Hughes, supra note 76 at 305.

[82] **Reporters Committee for Freedom of the Press v. United States Department of Justice**, 816 F.2d 730, 735 (D.C. Cir. 1987) ("[A] statute that is claimed to qualify as an Exemption 3 withholding statute must, on its face, exempt matters from disclosure [or] [w]e must find a congressional purpose to exempt matters from discourse in the actual words of the statute -- not in the legislative history of the claimed withhold statute or the agency's interpretation of the statute." Citing **Sims**, 1887 n. 11, emphasis added). **Association of Retired Railroad Workers, Inc. v. United States Railroad Retirement Board**, 830 F.2d 331 (D.C. Cir. 1987) (Affirming Retirement Board's refusal to provide names and addresses of railroad retirees to appellant for mailing/membership solicitation purposes. Ruled that names and addresses were exempt from disclosure under Exemption 3 "[w]hen the plain meaning establishes that the statute is a withholding statute, there is no need to consult the legislative history." Citing **Sims**, at 1887).

[83] "[T]he Secretary (of the Treasury) like the Director of
(continued...)

authority that Sims conferred upon the Director of the CIA was not extended to him in firing agency employees.[84] In only two cases was Sims cited as precedent for permitting agencies broad, unreviewable discretion to exempt unclassified as well as classified data from disclosure.

In **United States Student Association**,[85] decided by the District Court for the District of Columbia, Sims had a direct influence on the outcome. After the conclusion of the Church Committee hearings, the United States Student Association (USSA) requested disclosure by the CIA of all records in its possession concerning its predecessor, the United States National Student Association (USNSA). From 1952 to 1967 the CIA maintained a

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[83](...continued)
Central Intelligence in Sims, is better situated than the courts to determine when disclosure of information is likely to inhibit the collection of that information in the future." **Church of Scientology of California v. Internal Revenue Service** , 792 F.2d 153, 169 (D.C. Cir. 1986)

[84] Court of Appeals reversed and remanded a decision by the District Court upholding the firing of a career employee of the CIA who had voluntarily acknowledged his homosexuality. The court noted, citing **Sims**, that in sensitive matters of national security and intelligence "[t]he decisions of the Director [of the CIA]... are worthy of great deference." Nevertheless, the court held that neither the National Security Act nor **Sims** extended to the director absolute discretion to discharge employees. **John Doe v. William J. Casey, Director, CIA,** 796 F.2d 1508, 1521-2 (D.C. Cir. 1986)

[85] **United States Student Association v. Central Intelligence Agency**, 620 F. Supp. 565 (D.C.D.C. 1985).

covert relationship with the USNSA.[86] During that time the CIA had secretly funded the USNSA and had used some of its individual members in agency-sponsored operations. The existence of the relationship had been revealed by the Church Committee and the USSA sought disclosure from CIA of 1,484 documents concerning the relationship with its predecessor organization.

The CIA released 121 of the requested documents. For the remaining documents the agency withheld any disclosure claiming the contents were privileged under Exemptions 1 and 3 to the FOIA. The decision of the court was delayed pending the outcome of **Sims**. After the Supreme Court had ruled, the District Court, following the guidelines of **Sims**, awarded summary judgment to the Central Intelligence Agency.

Because the CIA relied on both Exemptions 3 and 1, the district court undertook an ex parte, in camera inspection of an unexpurgated copy of every twenty-fifth document.[87] On the basis of that review, the court awarded judgment for the CIA. Citing **Sims** as precedent, the court noted:

> [T]hat section 102(d)(3) of the National Security Act encompasses all "sources" used by the CIA to collect information related to its intelligence function, whether or not the "sources" are classified or were even promised confidentiality. "The legislative history

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[86] Id. at 566.

[87] Id. at 567-8.

> of § 102(d)(3) also makes clear the Congress intended to give the Director of Central Intelligence broad power to protect the secrecy and integrity of the intelligence process."[88]

None of the over 1,300 documents withheld by the CIA was ordered released by the district court, and no redacted versions of any of those documents were disclosed.

A year later, the same district court granted summary judgment to the government in the case of **Allen v. Department of Defense**.[89] Mark Allen, a researcher, sought disclosure through FOIA of all communications between Central Intelligence Agency and the House Select Committee which investigated the assassination of President John F. Kennedy. The district court ruled that exemption for national defense or foreign policy applied to permit the Agency to withhold records relating to intelligence sources.

The CIA, relying on the National Security Act of 1947[90] and

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[88] Quoting **CIA v. Sims**, at 1888. Id. at 570 (emphasis in original).

[89] **Mark A. Allen v. Department of Defense**, 658 F. Supp. 15 (D.C.D.C., 1986). Although the records sought in this case were CIA records, the case was docketed citing the Department of Defense as defendant. The opinion does not illuminate the question of why a FOIA suit for CIA records was filed naming the Department of Defense as defendant.

[90] Citing 50 U.S.C. § 403(d)(3) as the withholding statute.

Executive Order 12356[91] withheld most of the material sought by the plaintiff, citing Exemptions 3 and 1, respectively. In this case the agency relied, in part at least, on both of the recent developments permitting application of a "mosaic" theory to justify nondisclosure. In claiming Exemption 1, the court noted "the CIA relies on three provisions of Executive Order 12356 that make certain information classifiable if it, 'by itself or in the context of other information, reasonably could be expected to cause damage to the national security.'"[92]

Most of the information the CIA sought to withhold dealt with intelligence sources, according to the court. The CIA claimed that "revelation of the identities of their intelligence sources, or of information leading to their identities, would cause damage to the national security."[93] The court, relying on **Sims**, accepted the CIA's arguments. The court noted that:

> The U.S. Supreme Court in **C.I.A. v. Sims** upheld these reasons for withholding material, and spoke in emphatic terms of the "broad power" that the Director of the CIA has to determine what information is likely to lead to the disclosure of the identity of an intelligence source. . . . Thus, the discussion and conclusions of the Supreme Court in **Sims** are clearly determinative of

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[91] At 47 Fed. Reg. 14,874 (1982).

[92] Id. at 18, citing E.O. 12356, §1.3(b).

[93] Id. at 19 (emphasis added).

this case.[94]

In Allen the government successfully applied the "mosaic" theory to cast a wider net exempting not only classified information, but other information as well. It is difficult to gauge the effect of "mosaic" theory on this case because none of the information sought by the researcher in Allen was reviewed in camera by the district court. We cannot be certain that the information was not properly classified because no de novo determination was made by the court. Agency affidavits were sufficient to award summary judgment. Our clearest example of the impact of "mosaic" theory on the disclosure of unclassified information comes in another, unreported decision.

In this case, **American Friends Service Committee v. United States Department of Defense**,[95] the plaintiff sought access under FOIA to the Department of Defense's Technical Abstract Bulletins (TABs). The TABs are bi-weekly, bibliographic listings of military research, scientific and technical reports produced by the Defense Technical Information Center, a division of the Department of Defense. According to the court:

> The TABs contain information about classified or militarily sensitive [unclassified] technical reports

[94] Id., footnotes and citations omitted.

[95] Not reported in F. Supp., 1986 WL 10659 (E.D. Pa. 1986).

> only . . . . [but] do not contain the text of any of the listed technical reports. Instead the publication consists of bibliographic materials and indexes. Some of the entries also contain an abstract or summary of the listed reports contents.[96]

The TABs themselves bore an overall classification of "confidential" but, contained clearly marked and segregated classified and unclassified material. The Defense Department declined to release any of the publications in their entirety, nor redacted copies containing only bibliographic entries and abstracts of purely unclassified reports. Citing Exemptions 1 and 3, the Defense Department claimed that "the compilation of the unclassified information still require[d] security classification [of "confidential"] due to the additional informational quality derived from these listings when the TABs are analyzed in their entirety over an extended period of time." The department contended that the "combination or accumulation of the unclassified items contained in the TABs . . . require[d] classification pursuant to Executive Order 12,356" which expressly provided for the classification of information which "either by itself, or in the context of other information,

[96] According to the court, the TABs consisted primarily of citations for technical reports including title, author, information on availability or assigned classification of the report and reference numbers to identify it. Id. (emphasis added).

reasonably could be expected to cause damage to the national security."[97]

The district court concurred with the agency's application of the Executive Order, noting that:

> Classification of the TABs on a "compilation basis" supports the Defense Department's determination that the unclassified information contained in the TABs is not reasonably segregable, thereby requiring security classification for the entire issue of all TABs requested by plaintiff.[98]

The court awarded summary judgment to the Defense Department. This case marked the first use of Executive Order 12356 as authority for applying the "mosaic" theory to justify nondisclosure of purely unclassified information.

Conclusions

While it is tenuous to draw generalizations on the basis of these few cases, it is fair to state that "mosaic" theory is being incorporated by the Executive branch as a disclosure philosophy governing the release of national security information. Its effect is difficult to gauge because most of the decisions to classify information based on this "mosaic"

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[97] Citing E.O. 12356, §1.3(b).

[98] Id.

theory will remain beyond our realm of knowledge.

Only a relatively infinitesimal amount of the universe of information classified by the government is ever sought through FOIA. None of it has ever been released by order of a federal court.[99] Our ability, then, to judge for ourselves the impact of "mosaic" theory on public access to government information must be circumspect; our assessments speculative.

Nevertheless, one observation can be made on the basis of this examination. The intent of the Congress in passing FOIA was to inject more openness, not more secrecy into government. Incorporation of a "mosaic" theory of confidentiality provides officials a limitless license to classify even seemingly "innocuous" information and, thus, keep it from the public. This increase in the universe of potentially classifiable information, coupled with "excessive judicial deference to agency nondisclosure decisions," tilts the balance away from openness and toward increased secrecy in government.[100] If "mosaic" theory is, indeed, the Executive branch's contribution to the

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[99] According to testimony by the Reagan Administration in 1982, the government has never been forced by the courts to reveal classified information in response to a FOIA action. Supra note 27 at 187, 212.

[100] James A. Goldston; Jennifer M. Granholm; Robert J. Robinson, "A Nation Less Secure: Diminished Public Access to Information," 21 Harvard Civil Rights-Civil Liberties Law Review 409, 461 (1986).

"workable formula" that Congress called for in passage of FOIA,[101] it fails to balance "all interests" — especially the legitimate interests of the public — and provide for the "fullest responsible disclosure" of national security information. What contribution the Executive branch under President George Bush will make to this formula remain to be seen. However, in the delicate act of balancing, the Executive and Judiciary have thus far weighed in on the side of secrecy in government.

Why has the balance been tipped? According to one commentator:

> Times change — certain values, like open government, go in and out of favor. . . . [Today] history and political fortunes [have] changed, and the FOIA [has come] to be viewed as a kind of flower child of the irresponsible seventies, constantly threatened with defoliation.[102]

If "mosaic" theory in the eighties portends the future of openness in government, it's apparent from this analysis that for FOIA, the leaves have begun to fall.

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[101] See note 26, citing supra note 16.

[102] Patricia M. Wald, "The Freedom of Information Act: A Short Case Study in the Perils and Paybacks of Legislating Democratic Values," 33 **Emory Law Journal** 649, 683 (1984).